

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ZACH HILLESHEIM,

Plaintiff,

vs.

PARLOUR 1877, LLC,

Defendant.

8:18-CV-388

MEMORANDUM AND ORDER

This matter is before the Court on the plaintiff's motion for default judgment ([filing 14](#)). The Court will grant the motion and order injunctive relief.

BACKGROUND

The plaintiff, Zach Hillesheim, is paralyzed below the waist and uses a wheelchair for mobility; he is a qualified individual with a disability under the Americans with Disabilities Act, [42 U.S.C. § 12101 et seq.](#) (ADA). [Filing 1 at 3](#).¹ Defendant Parlour 1877 is an Omaha hair salon, and a place of public accommodation within the meaning of Title III of the ADA. [Filing 1 at 2](#).

Hillesheim visited Parlour 1877, but was hampered in his visit by architectural barriers. [Filing 1 at 3-4](#). Specifically, the ramp to the street entrance of the salon is too steep, and there is no level surface outside the door for a wheelchair to maneuver. [Filing 1 at 8](#). Inside, the counter height is too high for Hillesheim to access it. [Filing 1 at 8](#). Access to the restroom is limited by a lack of maneuvering clearance, and the restrooms themselves do

¹ When a default judgment is entered, facts alleged in the complaint—except as to damages—may not be later contested. [Marshall v. Baggett](#), 616 F.3d 849, 852 (8th Cir. 2010); [Murray v. Lene](#), 595 F.3d 868, 871 (8th Cir. 2010).

not meet ADA standards for insulated plumbing or clearance. [Filing 1 at 8](#). These deficiencies prevented Hillesheim from accessing the premises on a full and equal basis, because of his disability. [Filing 1 at 4](#). Removal of those barriers is readily achievable.² [Filing 1 at 9](#).

Hillesheim sued Parlour 1877 for its alleged ADA violations. [Filing 1](#). Service was executed. [Filing 5](#); see [filing 11](#); [filing 16-1](#). But Parlour 1877 never appeared or answered, and the Clerk of the Court entered Parlour 1877's default. [Filing 7](#).

DISCUSSION

When a default judgment is entered, facts alleged in the complaint—except as to damages—may not be later contested. [Marshall](#), 616 F.3d at 852; [Murray](#), 595 F.3d at 871. It remains for the Court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. *Id.* It is incumbent upon the Court to ensure that the unchallenged facts constitute a legitimate cause of action before entering final judgment. [Marshall](#), 616 F.3d at 852-53. Based on the admitted allegations of Hillesheim's complaint, the Court finds a legitimate cause of action: each of the defects described in the complaint is inconsistent with the [ADA Standards](#) promulgated by the Department of Justice and Department of Transportation.³

² And whether a requested accommodation is readily achievable or would constitute an undue burden are affirmative defenses that, obviously, have not been asserted. [Gorman v. Bartch](#), 152 F.3d 907, 912 (8th Cir. 1998); [Wong v. Muddy Pig, Inc.](#), No. 14-cv-3334, 2015 WL 225231, at *3 (D. Minn. Jan. 16, 2015).

³ The Court is aware that the ADA distinguishes between existing facilities and new construction. See [Disability Support All. v. Monali, Inc.](#), No. 15-CV-1522, 2016 WL 859442, at *12 (D. Minn. Feb. 12, 2016). The Court has reason to believe that Parlour 1877 occupies

As a result, the Court will order Parlour 1877 into compliance with the relevant guidelines for the defects identified in the complaint.⁴ Hillesheim's motion also includes a request for attorney's fees and nontaxable costs. [Filing 15 at 14](#). The ADA gives a court discretionary authority to grant the prevailing party attorney's fees, including litigation expenses, and costs. 42 U.S.C. § 12205; *Shrader v. OMC Aluminum Boat Grp., Inc.*, 128 F.3d 1218, 1220 (8th Cir. 1997). Hillesheim is clearly a prevailing party. See *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001). But the Court has no evidentiary basis to assess costs and fees at this time. So, Hillesheim may file a post-judgment motion for costs and attorney's fees pursuant to [Fed. R. Civ. P. 54\(d\)\(2\)](#).⁵

IT IS ORDERED:

1. Hillesheim's motion for default judgment ([filing 14](#)) is granted.

an older building, albeit in a space that has likely been renovated. See [filing 1-1](#); [filing 1-4](#). But in a facility that existed at the time the ADA was passed, the ADA's standards are still a guide, if not a requirement. See *id.* In the absence of any evidence or argument to the contrary from Parlour 1877, the Court will be guided by those standards.

⁴ Hillesheim's complaint also included a prayer for nominal damages. [Filing 1 at 12](#). But he seems to have abandoned that request in moving for default judgment, and rightly so: Title III of the ADA does not permit a private plaintiff to recover damages. See *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 342 (8th Cir. 2006); *Boitnott v. Border Foods, Inc.*, 361 F. Supp. 3d 858, 867 (D. Minn. 2019).

⁵ Counsel's attention is directed to [NECivR 54.3](#) and [NECivR 54.4](#); careful attention to those rules will facilitate the Court's ruling on such a motion.

2. Within a reasonable time after entry of this memorandum and order, Parlour 1877 is ordered to come into compliance with the ADA in the following respects:
 - a. An accessible route to the entrance to Parlour 1877 complying with ADA Standards, Chapter 4 shall be created, including the installation of a ramp not steeper than 1:10 and with a rise less than 3 inches, see § 405.2, and with level maneuvering clearance in front of the door, see § 404.2.4.4.
 - b. An accessible section of the service counter shall be made available, with a counter surface no taller than 36 inches above the floor. See § 904.4.1.
 - c. An accessible route to the restrooms shall be maintained, with a clear width of at least 32 inches, see § 403.5.1, and appropriate maneuvering clearance at the door, see § 404.2.4.1.
 - d. Clearance of at least 56 inches from the rear wall shall be maintained around the toilet. See § 604.3.1.⁶

⁶ The Court is aware that the required clearance may be permitted to overlap "shelves," *see id.*, which is the offending item in this case—but, ADA-complaint shelves are at least 40 inches above the floor, *see* §§ 603.4 and 604.8.3, and these aren't.

- e. Water and drain pipes under lavatories and sinks shall be insulated or otherwise configured to protect against contact. *See* § 606.5.
3. The Clerk of the Court shall mail a copy of this memorandum and order and the accompanying judgment to:

Parlour 1887, LLC
1243 Golden Gate Dr
Papillion, NE 68046

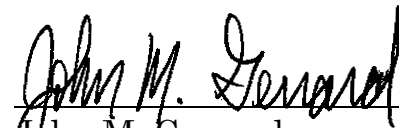
Parlour 1887
6068 Maple Street
Omaha, NE 68104

Parlour 1887, LLC
c/o Jeffrey Leuschen
319 S. 17th St, Ste 700
Omaha, NE 68102

4. A separate judgment will be entered.

Dated this 16th day of May, 2019.

BY THE COURT:



John M. Gerrard
Chief United States District Judge